United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

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Date: July 22, 1997

Case No. **95 INA 496**

In the Matter of:

ORIENT HOTEL GROUP, INC.,
Employer

on behalf of

YOUMING XU,
Alien

Appearance: R. H. Fanta, Esq. of New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Youming Xu (Alien) by Orient Hotel Group, Inc., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On February 14, 1994, the Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Corporate Liaison Director. The job to be performed was described as follows:

> Employee will act as a liaison with both overseas and domestic corporations, travel organizations and government agencies that require the use of the employer's international travel and tour facilities and accommodations. Employee will have responsibility for the negotiation of large corporate contracts with domestic and international travel agencies. Employee will supervise employer's tour and travel sales staff with overall responsibility for all international tour sales and related marketing and corporate planning as well as the development and acquisition of new corporate accounts.

Minimum requirements for the position were listed as a Bachelor's degree in Hospitality Administration and one year experience in the job offered. In addition, Employer required fluency in the Chinese (Mandarin) language. AF 249-250.

In a May 24, 1994 letter, the Local Alien Labor Certification Unit, inter alia, objected to Employer's foreign language requiremeant, observing that "[s]ince this is an international hotel chain which will host people from different parts of the world, why is the Chinese language so essential to the operation of this hotel? Please clarify." AF 245-247. The Employer replied,

> A question has been raised by your office as to why this job position requires the fluency in the Chinese language as a minimum condition for eligibility for employment in this position. We would like to address that issue at this point. We would estimate that over 60% of the work that this employee will perform on behalf of our company will rely upon and be

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

> dependent upon the Chinese language. This employee will be required to have frequent and ongoing communications with travel and tourism organizations located in the Peoples Republic of China, Taiwan and Hong Kong. This employee will also have overall responsibility for various aspects of the marketing operations of this company in the Asian markets that are conducted in the Chinese language. The dollar amount of income that this organization receives on an annual basis from Chinese speaking markets exceeds $1 million per year.
>
> The absence of the ability to communicate fluently in the Chinese language causes a severe adverse impact in the conduct of our business operations with Asian travel organizations, corporations, government agencies and associations. The person whom we employ for this position will have responsibility for acting as a corporate liaison director on behalf of our company.
>
> The person will be required to have frequent high level contact and communications with business officials throughout Asia. It is absolutely essential as a matter of business necessity that this person be able to communicate fluently and effectively with their corporate counterparts oversees (sic) in conducting business and marketing operations on behalf of our organizations.
>
> If we were not permitted to employ for this professional position a person fluent in the Chinese language, we would then be required to employ a translator and interpreter solely and exclusively for the purpose of translating to and from Chinese language into English on behalf of this employee. We are not in a position where we can afford such unnecessary personnel expenses.

In addition, Employer submitted numerous documents evidencing the use of the Chinese language in its business. AF 128-244.

Notice of Findings. On March 3, 1995, the CO's Notice of Findings (NOF) advised that, subject to rebuttal, labor certification would be denied on grounds that the Employer's requirement of fluency in Chinese (Mandarin) appeared unduly restrictive for the position. Employer was directed either to provide documentary evidence to support a finding that the language requirement was a business necessity or to delete that requirement and conduct new recruitment. The NOF then required the Employer to submit the types of documents that the individual will be working with that require the need to speak Chinese. In addition, said the CO, in order for the Employer to establish business necessity it must submit the following persuasive evidence in support of business necessity: (1) The total number of clients/people the employer deals with and the percentage of those people that the employer deals with who cannot communicate in English. (2) Identify the specific nature of the employer's business and the percentage of his/her business that is dependent upon the

language. (3) Document and describe how the absence of the language would adversely impact business. (4) The percentage of time a worker would use the language by necessity rather than choice. (5) Describe how the employer has dealt with and handled Chinese speaking clients previously or is currently handling this segment of business. (6) Describe services provided by the employer to other ethnic groups and how the language problem is handled. (7) Any other documentation which clearly shows that fluency in Chinese is essential to the employer's business. AF 103-106.

Rebuttal. Employer's rebuttal said, "We specifically focus and emphasize on attracting Chinese businessmen and tourist groups as the mainstay of our clientele. This corporation has over 1,000 corporations, associations, tour and travel operator accounts. Approximately 50% of the personnel of those organizations are unable to communicate fluently in the English language and rely upon the use of written and spoken Chinese (Mandarin) language as their principal form of communication." Employer said the revenue generated from its Chinese speaking clients is well over $1 million per year, and it added, "If the person whom we employ for this position as corporate liaison director was unable to communicate in Mandarin with the representative in various Chinese corporations, associations, tour and travel organization[s] that we have accounts established both domestic and overseas, there would be an extremely adverse negative impact upon our business as a direct result of this language barrier, that would directly result in a significant loss of business". The Employer estimated that the employee for the petitioned position would be using the Chinese Mandarin language at least 50% of the time in sales and marketing plans to corporate travel corporations and government agencies, and added, "By having a corporate liaison director who is fluent in the Chinese Mandarin language, we are able to directly attract Chinese corporations, associations, tour groups, both domestic and overseas in mainland China, Taiwan and Hong Kong. Also, we are able to work with Chinese newspapers, magazines, radios and TV stations in advertising and marketing promotion to the Chinese community". Finally, the Employer submitted numerous additional documents evidencing the use of the Chinese language in its business. AF 06-102.

Final Determination. On May 25, 1995, the CO issued a Final Determination in which labor certification was denied, based on the CO's conclusion that Employer had not established the business necessity of its foreign language requirement. In denying certification, the CO concluded that, while the documents submitted by Employer "show that the employer does in fact have Chinese clientele, they do not show how the language requirement relates to the job duties performed by the Corporate Liaison Director at the employer's place of business in Stamford, Connecticut". AF 03-04.

Appeal. Employer filed a request for review of the denial on June 15, 1995, and thereafter filed a brief in support thereof.

Discussion

The Act and regulations provide that a job opportunity's requirements, unless adequately documented as arising from business necessity, shall not include requirements for a language other than English. 20 CFR § 656.21(b)(2)(i)(c). In **Information Industries, Inc.**, 88 INA 82 (February 8, 1989)(en banc), the leading BALCA case on "business necessity," held that, "To establish business necessity under 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of Employer's business and are essential to perform, in a reasonable manner, the job duties as described by the Employer". As applied in relation to foreign language requirements, the first element of proof turns on evidence as to whether employer's business includes clients, co-workers or contractors who speak a foreign language, and the percentage of the employer's business that involves this foreign language. The second element of proof requires the finding that the employee's job duties require communicating or reading in a foreign language.

To document its business necessity, the Employer stressed that its travel business focuses on attracting and catering to Chinese businessmen and tourist groups. Employer said its customers include more than 1,000 corporations, associations, tour and travel operator accounts, adding that about 50% of the personnel of those organizations are unable to communicate fluently in the English language and rely upon the use of written and spoken Chinese (Mandarin) language as their principal form of communication. Employer said the revenue generated from its Chinese speaking clients is well over one million dollars per year. In denying certification, the CO concluded that although the documents Employer submitted show that it does in fact have Chinese clientele, it failed to show how the language requirement relates to the job duties performed by the Corporate Liaison Director. We disagree.

Contrary to the CO's conclusion, we find that the Employer's documentary evidence adequately supports its contention that fluency in the Chinese (Mandarin) language is a business necessity for the position described in its application. The duties of the Corporate Liaison Director require the prospective employee to serve as the Employer's liaison with both overseas and domestic corporations, with travel organizations, and with government agencies that require the use of Employer's international travel and tour facilities and accommodations. The Corporate Liaison Director will be responsible for the negotiation of large corporate contracts with domestic and international travel agencies. In addition, the Corporate Liaison Director will be required to develop and acquire new corporate accounts.

Moreover, the Employer's evidence includes numerous reservation and rooming lists documenting the bookings of Asian clientele, as

well as correspondence from China & Asia Travel Service, Inc., which is in Chinese. Employer has submitted other correspondence and schedules in Chinese, translated into English, as well as a Tour Guide for Asian/Chinese in Chinese, telephone advertisement and listings in Chinese of Travel Agencies with which the Employer does business, scheduling documents in Chinese from Employer's hotel, and a check and correspondence in Chinese between the Alien and the Chinese Association for International Exchange of Personnel Ltd. AF 16-23, 42-57, 62-64, 68-72, 74, 75, 80, 91, 92, 102.

Employer estimated that 50-60% of the work that this employee will perform on behalf of the company will rely upon and be dependent upon the Chinese language. Employer indicated that the prospective employee will be required to have frequent and ongoing communications with travel and tourism organizations located in the Peoples Republic of China, Taiwan, and Hong Kong, and will have overall responsibility for various aspects of the marketing operations of the Employer in Asian markets which will be conducted in the Chinese language. In addition, it said this employee's work will require frequent high level contact and communications with business officials throughout Asia. Consequently, the Employer concluded, it is essential that this employee be able to communicate fluently and effectively with counterpart corporate employees in conducting business and marketing operations overseas on behalf of Employer.

The Employer's evidence has demonstrated that the very essence of the position of Corporate Liaison Director is communication with Employer's clientele and prospective clientele, many of whom communicate and conduct their business entirely in Chinese. As a liaison and promotion oriented job, dealing with a Chinese speaking public effectively does constitute a business necessity for this Employer. For these reasons it is concluded that the requirement of fluency in Mandarin Chinese is inherent in the job duties of this position due to the very nature of the work. As the Employer has documented business necessity for its foreign language requirement, we find that labor certification was improperly denied and that the order of the CO should not be affirmed.

Accordingly, we conclude that the CO's denial of certification was not proper under all of the facts of this case, and the following order will enter.

ORDER

1. The Certifying Officer's denial of labor certification is hereby Reversed for the reasons hereinabove set forth.

2. This Appellate File is remanded to the CO with directions to issue an appropriate order granting certification under the Act and regulations.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 496

ORIENT HOTEL GROUP, INC., Employer
YOUMING XU, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: July 14, 1997